Supreme Court, U.S.
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No. 05-228

In The

Supreme Court of the United States

NOEL UDARBE,

Petitioner,

v.

ALBERTO GONZALES, UNITED STATES ATTORNEY GENERAL, AND DEPARTMENT OF HOMELAND SECURITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER WILLIAM HELT
Counsel of Record
LAW OFFICES OF CHRISTOPHER W. HELT
325 West Huron Street
Suite 515
Chicago, Illinois 60610
(312) 266-0531
Attorney for the Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the disparate treatment of Petitioner from others similarly situated violates the equal protection principals embodied in the Fifth Amendment in that 18 U.S.C. § 16 can be used to remove a non-citizen convicted of a crime in one state but not in another state convicted of the same crime.

2. Whether the enactment of IIRAIRA now creates a statutory rather than regulatory right for aliens seeking redress through motions to reopen or reconsider under 8 C.F.R. § 1003.2(d) making this Court's decision in *Stone v. INS* no longer applicable to IIRAIRA cases.

PARTIES TO THE PROCEEDINGS BELOW

The caption of this case contains the names of all the parties to the proceedings in the courts below. Petitioner Noel Udarbe was the petitioner in the court of appeals. Respondents, Alberto Gonzales, the United States Attorney General, and the Department of Homeland Security, and its agencies within that department, were the respondents in the court of appeals. Petitioner Noel Udarbe was the respondent before the Board of Immigration Appeals and the Department of Homeland Security was the only other party before the Board of Immigration Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that this Court vacate the order of the United States Court of Appeals for the Seventh Circuit which dismissed petitioner's petition for review for lack of jurisdiction and direct the court of appeals to exercise jurisdiction over the petition for review and vacate the removal order against petitioner.

OPINIONS BELOW

The opinion of the court of appeals is unpublished and is reproduced at App. 1. The opinion of the Board of Immigration Appeals is unpublished and is reproduced at App. 4.

JURISDICTION

The court of appeals dismissed the petition for review on May 16, 2005. Petitioner timely filed a petition for a writ of certiorari on May 16, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The statutes relevant to this proceeding are 8 U.S.C. § 1101(a)(43)(F), 8 U.S.C. § 1101(h), 8 U.S.C. § 1182(a)(2)(E), 18 U.S.C. § 16, and Indiana Stat. § 316.193(3)(c)(2). They are reprinted in the appendix to this brief.

STATEMENT OF THE CASE

A. Facts

Noel Udarbe, a native and citizen of the Philippines, has been a lawful permanent resident of the United States since his arrival in 1982. He is married to a United States citizen. In 2001, Udarbe pled guilty and was convicted of battery in Indiana and sentenced to one year in jail. Under current immigration interpretations and the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA" or the "Act") he was placed in removal proceedings by the Department of Homeland Security's ("DHS") Immigration and Customs Enforcement on May 23, 2002, alleging that his conviction constituted an aggravated felony. DHS charged him as a removable alien under 8 U.S.C. § 1227(a)(2)(A)(iii).

On July 9, 2002, Petitioner appeared before the Immigration Judge in Chicago, Illinois. The Chicago Immigration Court, known as the Executive Office for Immigration Review, oversees cases in the states of Illinois, Indiana, Missouri and Wisconsin. Udarbe admitted that he had been convicted of a misdemeanor battery offense (Case No. 45G01-99-CF-00016) on November 9, 2001 in Crown Point, Indiana, but claimed that his conviction should not qualify as an "aggravated felony" for immigration purposes thereby subjecting him to deportation. Udarbe asserted that the application of 8 U.S.C. § 1101(a)(43) to his Indiana misdemeanor battery conviction violated his Equal Protection rights as guaranteed by the due process clause of the Fifth Amendment because the terms of imprisonment for misdemeanor battery convictions vary from state to state and that if he were convicted for the same actions under a misdemeanor offense of battery in another state (such as Illinois) and

received the maximum sentence, as he did in Indiana, his conviction would not be an aggravated felony under the Act and he would not be subject to removal by DHS. He argued that removing him under that provision violated his Fifth Amendment rights because if he had been convicted of the same crime in Illinois (which incidentally was the locus of his immigration hearing), the maximum sentence would have been 364 days, meaning that he would not have been convicted of a "aggravated felony" under IIRAIRA and therefore was not removable from the United States.

After a hearing on the matter, the immigration judge ordered Udarbe removed to the Philippines. Udarbe filed a timely notice of appeal with the Board of Immigration Appeals ("BIA"). Udarbe appealed to the Board of Immigration Appeals ("BIA"), a component of the United States Department of Justice's Executive Office for Immigration Review.

On February 20, 2004 the BIA issued a written decision denying petitioner's appeal stating that "it did not have authority to rule on the constitutionality of the act [IIRAIRA]". On March 10, 2004 the Petitioner filed a motion to reconsider based on the fact that the Board should have attempted to avoid statutory interpretation based on constitutionality, stating that construction of doubtful constitutional validity should be avoided where possible, citing *United States v. Witkovich*, 353 U.S. 194, 199 (1957). On April 6, 2004, the BIA denied the motion to reconsider, again claiming the inability to rule on constitutional issues. On appeal to the Board of Immigration Appeals, he again admitted his conviction and sentence but repeated his equal protection argument. The BIA dismissed Udarbe's appeal, stating that it did not "have

the authority to rule on the constitutionality of the Act. . . ." Udarbe filed a motion to reconsider, which the Board also denied. Udarbe appealed that decision as well, arguing again that his constitutional rights were violated and that the Board erred in determining that it did not have the authority to rule on his constitutional claims. The BIA also denied his motion to reconsider. Udarbe then filed a Petition for Review with the Seventh Circuit Court of Appeals, challenging the BIA's decision to deny this motion to reconsider, asserting also the original due process and constitutional issues presented in his BIA appeal.

On May 16, 2005, in an unpublished decision, the Seventh Circuit Court of Appeals dismissed his appeal, holding that it did "not have jurisdiction to consider Udarbe's claim that the Board erred in its initial decision not to consider Udarbe's constitutional arguments." The Court also added that "[u]nfortunately for Udarbe, we don't have the authority to examine the merits of his constitutional argument, either." The Court did not cite authority for its decision to dismiss the appeal on that basis. However, the Court stated in its opinion that earlier it "issued an order explaining that, because Udarbe did not file a timely petition for review of the Board's initial decision, this appeal is limited."

Clearly, the Seventh Circuit believed that since it was limited only to the issues presented in the motion to reconsider, it could not make a determination on the BIA's previous order dismissing Udarbe's immigration appeal. There is no dispute as to whether Udarbe presented the original issues in his motion to reconsider with the BIA, only whether he could preserve these issues in a subsequent appeal to the Seventh Circuit, if